Supreme Court, U.S.
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IN THE

United States Supreme Court

DONALD HECHT, by his Co-Guardian,
DONALD HECHT, SS#: 054-60-6120 DI,

Petitioner,

against

JO ANNE B. BARNHART, Commissioner
of the Social Security Administration,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Second Circuit err by not applying the holding in *Christensen v. Harris County*, 529 U.S. 576 (2000), whereby the Judiciary is to defer to a promulgated regulation and not defer to an agency internal memo, in a case in which the SSA Commissioner did not apply to the *Hecht* facts, her own income regulation, 20 C.F.R. § 416.1130(b), that is applied by the SSA Commissioner in the Seventh Circuit States?

Because the SSA Commissioner is not acquiescing to the Seventh Circuit unappealed *Jackson v. Schweiker*, 683 F. 2d 1076 (7th Cir. 1982), decision which applied the SSA Commissioner's income regulation, 20 C.F.R. § 416.1130(b), have SSA Commissioner Barnhart and Attorney General Ashcroft breached the "take Care" clause of Article II, Section 3 of the Constitution, by continuing to implement a SSA nonacquiescence policy, based on the Immigration and Naturalization Service *United States v. Mendoza*, 464 U.S. 154 (1984), decision?

PARTIES TO THE PROCEEDING

Petitioner Daniel Hecht is a severely disabled 28 year old who cannot walk, talk, or perform any activities of daily living. He is represented in the action by his Guardian-father Donald Hecht, Esq.

The respondent is the Social Security Administration Commissioner who rendered the decision after the petitioner had exhausted his administrative remedies.

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OPINIONS BELOW

On August 26, 2002, Judge Arthur Spatt of the Eastern District of New York rendered a Memorandum and Order that affirmed the Social Security Administration (SSA) Commissioner's decision to reduce the monthly SSI benefits by one third because the Guardian-Trustee of a Court Ordered Supplemental Needs Trust, who was also the parent-landlord, paid the rent of Daniel Hecht. Judge Spatt rejected all of the plaintiff's arguments and did not apply the SSI regulatory standard, 20 C.F.R. 416.1130(b), to the *Hecht* facts.

Rather than apply a regulatory standard, Judge Spatt deferred to SSA Commissioner's application of SSA Program Operations Manual Systems standard, POMS SI 01120.200(E)(1). The plaintiff appealed that decision making the argument that Judge Spatt erred by not applying the SSI income regulation, 20 C.F.R. § 416.1130(b).

On June 27, 2003, the Second Circuit Court of Appeals issued a Summary Order and affirmed Judge Spatt's decision. As to the *Christensen* administrative law holding, the Second held that:

> Hecht is correct that such policy statements are not entitled to the same *Chevron* deference as implementing regulations. *See Christensen v. Harris County*, 529 U.S. 576. 587-88 (2000) (discussing *Chevron U.S.A.,Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984)). Nevertheless, policy statements are "entitled to respect" to the extent that they have the "power to persuade." *Id.* at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also McMenemy v. City of*

Rochester, 241 F.3d 279, 284 (2d Cir. 2001) (upholding statutory interpretation in agency manual that was consistent with language and purpose of the law, noting that "even when deference is not required, an agency has a "body of experience and informed judgment to which courts and litigants may properly resort for guidance" (quoting *Skidmore*, 323 U.S. at 140)). The distinction POMS SI 01120.200 draws between trust principal and disbursements is persuasive both because consistent with the treatment of in-kind income in 20 C.F.R. § 416.1103 (g) as well as with New York State trust law. *See* N.Y. Est. Powers & Trusts Law § 7-1.12 (b)(3) (McKinney 2002) ("actual distributions from the trust may be considered to be income or resources of the beneficiary to the extent provided by the terms of any (government benefits) program"). *Id.* slip opinion, p. 5.

The Court is advised that the petition for a Second Circuit rehearing is pending.

STATEMENT OF JURISDICTION

Jurisdiction is invoked under 28 U.S.C. § 1254(1). Petitioner seeks a review of the Second Circuit Court of Appeals *Hecht v. Barnhart* Summary Order because the Second Circuit did not apply this Court's *Christensen v. Harris County*, 529 U.S.576 (2000), administrative law holding, and because there is a conflict between the Second Circuit *Hecht* Summary Order and the Seventh Circuit *Jackson v. Schweiker*, 683 F. 2d 1076 (7th Cir. 1982), decision applying the SSA Commissioner's income regulation, 20 C.F.R. § 416.1130(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article II, Section 3 of the Constitution:

> . . . . . he shall take Care that the Laws be faithfully executed . . .

2. The SSI statutory income standard 42 U.S.C § 1382a(a)(2)(A):

> (2) unearned income means all other income, including,
>
> A) support and maintenance furnished in cash or kind;

STATEMENT OF THE CASE

In 1972 President Nixon, created a new federal welfare program, Supplemental Security Income (SSI), Title XVI of the Social Security Act. On January 1, 1974, the enabling SSI statute replaced the State administered Federal categorical AABD (aid to the aged, blind and disabled) programs. 42 U.S.C. § 1381 *et seq.*

On December 14, 1974, Daniel Hecht was born. At the age of three months, Daniel suffered a severe reaction to a pertussis inoculation and became permanently disabled such that he cannot walk, talk, or perform any activities of daily living.

On May 2, 1988, plaintiff settled the action *Hecht v. Heitler, Haber, et al.* Index No. 3313/84 (Nassau Co. Sup. Ct.), for approximately $ 500,000 and an annuity paying $ 1000 per month for David's life. On November 9, 1992,

Donald S. Hecht and Laura Hecht were appointed the Co-Conservators of Daniel Hecht, their son.

On August 11, 1993, President Clinton signed into law OBRA 1993 which established the statutory right of a disabled person to establish a Trust in order that the disabled person would not lose the right to receive government entitlements on the condition that upon death, the resources remaining in the Trust would be subject to a Medicaid lien. 42 U.S.C. § 1396d(4)(A). In 1994, New York State enacted compliance legislation and denominated these Trusts as Supplemental Needs Trusts (SNT). *See* E.P.T.L. 7-1.12.

On December 19, 1995, the plaintiff's parents, petitioned the Nassau Supreme Court to covert the Conservatorship to a Guardianship and transfer the assets of the plaintiff into an SNT. On March 26, 1996, State Court Justice Rossetti signed the Order and Judgment appointing the Co-Guardians and ordered that the resources be transferred into the proposed SNT.

The Order included payment by the Trustee from the SNT of $ 2000 month caretaking stipend for the Co-Guardian-mother Laura Hecht and $ 750 for room and board. The Order contained an explicit income standard that the Trustee was to apply the legal standard as applied in the Second Circuit's *Ruppert* decision. "The Trustee will provide income in-kind from the Trust pursuant to its specific distribution provisions in order to provide for the special needs of the beneficiary by furnishing those items of need not provided by government entitlements consistent with the definition of income as intended by the Congress and decided in *Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989).

On May 14, 1998, the defendant granted the June 14, 1996 *Hecht* application for Supplemental Security of Income (SSI) benefits. However, the defendant reduced the plaintiff's monthly SSI payment amount because of the alleged receipt of in-kind income:

> *The food, clothing, or shelter he got from someone.* We value the food, clothing or shelter at $ 176.66 for June 1996 through December 1996, $ 181.33 for January 1997 through December 1997 and $ 184.66 for January 1998 through May, 1998. Emphasis Added.

On September 15, 1999, ALJ Emanuel Poverstein reversed the initial decision and explicitly made a finding of fact that all disbursements were authorized by the Court and did *not* constitute in kind support and maintenance:

> 4. *As disbursements from the trust are directed and authorized by an appropriate court in accordance with the terms of the trust*, the disbursements do *not* constitute in kind support and maintenance and therefore cannot be deemed income of the claimant. Emphasis Added.

On October 7, 1999, Regional Commissioner Disman requested that the SSA Deputy Director of Office of Appellate Operations reopen the decision based on the application of POMS SI 01120.200E.1.b:

> A review of the file indicates that the claimant has an excluded "supplemental needs trust that pays $ 750.00 of his mortgage, rent, heating fuel, water, gas, property taxes, electricity, garbage removal and

> sewer bills." *Because this was used toward his shelter costs, the maximum amount of in-kind support and maintenance was charged.*
>
> *There is nothing in the Regulations that would allow for the exclusion of this type of income. However, POMS SI 01120.200E.1.b. states* "Food, clothing or shelter received as a result of disbursements from the trust by the trustee to a third party are income in the form of in-kind support and maintenance and are valued under the presumed maximum value (PMV) rule. Emphasis Added.

On May 12, 2000, Administrative Appeals Judge (AAJ) Peter N. Dowd affirmed the decision of SSA Regional Disman that ALJ Poverstein had applied an incorrect legal standard and reversed ALJ Poverstein's September 15, 1999 decision. AAJ Dowd discussed the SSI income regulation, 20 C.F.R. 416.1130, but did not apply the Seventh Circuit "Jackson" regulation, 20 C.F.R. 416.1130(b).

> Because the principal of a supplemental needs trust is not charged as a resource to the beneficiary of the trust, the distributions from the trust paid to a provider of support and maintenance *result in in-kind income to the beneficiary of the trust (20 CFR 416.1130), rather than cash income. In-kind income is valued under the "presumed value rule" (20 CFR 416.1140); i.e.*, the value of the support is presumed to be one-third of the Federal benefit rate plus $ 20, unless there is a showing that actual value is less. Emphasis added.

Pursuant to 42 U.S.C. § 405(g), the petitioner filed a complaint to appeal this decision. The plaintiff alleged that the SSA commissioner was implementing a nonacquiescence policy by not applying the "Jackson" regulatory standard, 20 C.F.R. § 416.1130(b), to the *Hecht* facts because the plaintiff's rent of $ 750 per month was more than one third of his SSI income payment.

REASONS FOR GRANTING THE WRIT

Petitioner Daniel Hecht respectfully requests that this Honorable Court issue a Writ of Certiorari and review the Second Circuit Court of Appeals *Hecht* Summary Order which held that the Social Security Administration correctly reduced Daniel's monthly Supplemental Security Income (SSI) benefits because his rent of $ 750 per month was paid by the Trustee of his Supplemental Needs Trust, notwithstanding an SSA income regulation, 20 C.F.R. 416.1130(b), which if applied would *not* have counted the private rent subsidy as countable income to reduce the monthly SSI payment amount.

The Second Circuit's decision to apply the POMS, its internal memo standard, rather than the SSI income regulatory standard, is not consistent with this Court's *Christensen v. Harris County*, 529 U.S. 576 (2000), administrative law holding. In *Christensen*, this Court eliminated any ambiguity in the application of the *Chevron* Doctrine as to the Judiciary's deference to letter-opinions of Executive Branch counsel as applied in a Fair Labor Standards Act of 1938 (FSLA) case:

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after,

> for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters-like interpretations contained in policy statements, *agency manuals*, and enforcement guidelines, *all of which lack the force of law*—do not warrant *Chevron*-style deference. *Id.* at 1662. Emphasis added.

In *Hecht*, the SSA Commissioner's POMS SI 01120.200(E)(1), was an interpretation of the SSI income regulation, 20 C.F.R. 416.1130(b). By applying the POMS standard to the *Hecht* facts, rather than the underlying income regulation, the Court jumped to a "power to persuade" analysis, rather than first applying the income regulation, 20 C.F.R. 416.1130(b), to the facts.

If the petition was granted, then this Court would first decide whether the *Christensen* administrative law holding applies to the Social Security Administration with its complicated and elaborate POMS. *See* SSA.gov. The Court would then have an opportunity to clarify the sequence of applying the *Christensen* holding as to whether the reviewing court is to first apply the promulgated regulation upon which the POMS is based, and only apply the POMS "power to persuade" standard if there is ambiguity in the promulgated regulation.

This case also raises the lurking issue of the SSA Commissioner's implementation of an SSA nonacquiescence policy whereby the SSA Commissioner's counsel decide which circuit court decisions are "incorrectly" decided, should *not* be appealed, and should *not* be applied in any other Circuit. In *Hecht*, the SSA Commissioner did not apply the unappealed Seventh Circuit *Jackson v.*

Schweiker, 683 F. 2d 1076 (7th Cir. 1982), decision which interpreted the application of the SSI income regulation, 20 C.F.R. 416.1130(b).

If the *Hecht* petition was granted, then this Court could revisit *United States v. Mendosa*, 464 U.S. 154 (1984), which affirmed the right of the Immigration and Naturalization Service to make nonacquiescence litigation decisions. This is a timely issue because SSA Commissioner Barnhart is presently confronted with an equal protection conundrum as she constructs the Notices that will cure the due process violations in the unappealed nationwide class decision, *Ford v. Shalala*, 87 F. Supp 2d 163 (E.D.N.Y. 1999). Petitioner Hecht is one of the *Ford* class members who resides in the Second Circuit in which the Seventh Circuit *Jackson* holding and the resulting "Jackson" income regulation, 20 C.F.R. 416.1130(b), has not been applied to the *Hecht* facts.

In summary, the Court should grant the petition in order to have an opportunity to review the SSA Commissioner's decision not to apply the *Christensen* holding administrative law holding when rendering an SSA adjudication. The petition should also be granted in order that the Court can decide whether this Court's 1984 *Mendosa* decision should apply to the SSA now that the SSA Commissioner has duty to cite to duly promulgated regulations in Notices to be sent to the nationwide *Ford* class members, one of whom is petitioner *Hecht*.

POINT I

THE COURT BELOW ERRED BECAUSE IT DID NOT CORRECTLY APPLY THE CHEVRON DOCTRINE, AS INTERPRETED BY THIS COURT IN *CHRISTENSEN*, BECAUSE THE COURT DEFERRED TO THE SSA AGENCY MANUAL AND NOT TO THE SSA COMMISSIONER'S INCOME REGULATION.

The petitioner argues that the Second Circuit erred when rendering the summary order to affirm Judge Spatt's decision affirming the SSA Commissioner's decision. The petitioner argues that the Second Circuit should have applied this Court's May 1, 2000 *Christensen* holding to the facts because the Second Circuit deferred to the SSA Commissioner's POMS, the agency manual standard,, as to the standard to apply, rather than apply the SSA Commissioner's promulgated income regulation, 20 C.F.R. § 416.1130(b).

A. The *Christensen* standard

In *Christensen*, this Court eliminated any ambiguity as to the application of the *Chevron* Doctrine and judicial deference to an agency memo when there is a duly promulgated regulation to apply. Justice Thomas rejected the Department of Labor's and Solicitor General Waxman's "letter-opinion" argument in *Christensen*:

> Seeking to overcome the regulation's obvious meaning, the United States asserts that the agency's opinion letter interpreting the regulation should be given deference under our decision in *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L.Ed. 2d 79 (1997). In *Auer*, we held that an agency's interpretation of its

> own regulation is entitled to deference. *Id.* at 461, 117 S. Ct. 905. *See also Bowles v. Seminole Rock & Sand Co.*, 3235 U.S. 410, 65 S. Ct. 1215, 89 L.Ed. 1700 (1945). But *Auer* deference is warranted only when the language of the regulation is ambiguous.—it is plainly permissive. *To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.* Because the regulation is not ambiguous on the issue of the compelled compensatory time, *Auer* deference is unwarranted. *Id.* at 1612. Emphasis added.

The petitioner argues that the SSA Commissioner's regulation is not ambiguous as to meaning, but only as to its limitation to the Seventh Circuit States. That limitation issue is not a *Christensen* issue, but a *Mendosa* issue of the SSA Commissioner implementing a *Jackson* nonacquiescence policy notwithstanding the July 25, 1985 that the nonacquiescence policy had ended on June 3, 1985. See POINT II.

The Second Circuit in *Ruppert* had reconciled its holding with *Jackson* by citing to Solicitor General Lee's October, 1983 *Glasgold-Rothman-Guigno* Brief:

> Appellants point out that the Solicitor General's brief successfully opposing the grant of certiorari in *Rothman* said, irrespective of the positions taken by the Secretary before this court and the *Jackson* court at various stages in each case:
>
> Petitioners rely heavily on *Jackson v. Schweiker*, 683 F.2d 1076 (7th Cir. 1982), which they claim conflicts

with the decision below and several other court of appeals decisions. However, no such conflict exists.

In *Jackson*, the class representative had her benefits terminated by application of the presumed maximum value regulation when it was determined that she received a rental subsidy from her sister although she nonetheless was paying 77% of her income for rent. The court of appeals expressly "accept[ed] the general validity of the regulation as applied in many situations" (*id.* at 1079 n. 2), but held that, on the particular facts of *Jackson*, it was inappropriate to include the rental subsidy as countable income because "where a very large percentage of income *** is committed to shelter costs before termination of SSI, it flies in the face of reality to conclude that 'unearned income' in the form of subsidized shelter *** is actually available to the recipient." *Id.* at 1085 (emphasis in original). The court of appeals below correctly stated that the rule announced in Jackson was inapplicable here and instead relied on the decisions in other circuits upholding the regulations. . . . Indeed, the *Jackson* court itself recognized the limited nature of its holding, and it explicitly stated that its decision did not conflict with the court of appeals decisions upholding ***1180** the regulations, at 6-7, *Guigno v. Heckler*, 464 U.S. 984, 104 S.Ct. 428, 78 L.Ed.2d 362 (1983) (denial of certiorari in *Rothman*) (emphasis added).

However, notwithstanding its unappealed *Ruppert* decision, the Second Circuit did not apply the "Jackson" regulation. Rather, the Second Circuit applied the POMS standard that interpreted the income regulation as applied

to a payment of rent by the Trustee of a State Court ordered Supplemental Needs Trust.

B. The SSA Commissioner's "Jackson" regulation

The *Jackson* regulation, 20 C.F.R. § 416.1130(b), does *not* make the Trust fund v. non-Trust fund source of payment distinction as made in *Hecht*. The history of the *Jackson* regulation reveals the importance of compliance with the APA in order for the public to be advised of the standards applied in a national program which Congress intended would have uniform standards equally applied in all 50 States.

On January 6, 1984, sixteen years prior to the *Christensen* decision, Chief Judge Sharpe in *Jackson v. Heckler*, 581 F. Supp. 871 (N.D. Ind. 1984), ordered Secretary Heckler to promulgate an SSI in-kind income regulation in order to comply with the Seventh Circuit's unappealed 1982 *Jackson* remand order:

> As an initial matter, the court will consider the parties' dispute over *whether the Secretary must amend the relevant regulation or simply modify internal operation procedures and manuals.* The plaintiff argues that the relief mandated by the court of appeals will be effectively implemented only if SSI claimants and *their representatives or advocates have access to the modifications throughout the regulations found in the Federal Register and the Code of Federal Regulations.* Otherwise, persons using the normal research tools will find nothing but the regulation which found inadequate by the court of appeals and will have no indication that it has been modified. While instructions and guidelines in

> internal operating manual and policy statements may be effective means of informing social security administration personnel it is not an effective means of informing claimants and their representatives. *There is simply no basis for assuming internal operational manual are generally available. Furthermore, the Secretary has not advanced any compelling reason why the regulation should not be amended.* Therefore, this court will require an amendment to the challenged regulation. Emphasis Added.

On October 10, 1985, Judge Sharpe issued a *Jackson* order requiring publication of the amendment to the SSI in-kind income regulation to comply with the Seventh Circuit's order in *Jackson v. Schweiker*, 683 F. 2d 1076 (7th Cir. 1982). On March 27, 1986, based on the *unappealed Jackson v. Schweiker* Seventh Circuit decision, Secretary Bowen certified a proposed amendment to the SSI regulation, 20 C.F.R. § 416.1130. However, without explanation, Secretary Bowen limited the regulation's application to only SSI recipients who resided in the Seventh Circuit States of Indiana, Illinois, and Wisconsin. *See* 51 FR 13487 (April 21, 1986).

C. The July 25, 1985 sworn Congressional testimony that the HHS nonacquiescence policy was to have ended on June 3, 1985

On July 25, 1985, an Oversight Hearing before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary: *Judicial Review of Agency Action: HHS Policy of Nonacquiescence*, was held to consider legislation to end HHS Sec-

retary Heckler's nonacquiescence policy. However, Members of Congress were advised in sworn Congressional testimony that no legislation was needed because HHS and SSA had voluntarily ended their nonacquiescence policy as of June 3, 1985.

Acting SSA Commissioner Martha McSteen explained to Members of Congress the new post-June 3, 1985 "acquiescence" policy, at Tr. 7:

> Mr. Chairman, I know the questions have been raised about this new policy, but I believe we have done our best to reconcile *the need for national uniformity and efficiency* with the wide variety of interpretations of the law by circuit courts.

and at Tr. 19:

> *We will obey the court directives.* We want to follow the congressional mandate. We are very concerned about the individual beneficiaries, and fourth, *we must ensure that we have a uniform method of operating and apply those standards uniformly.* So we debated the issue of how to implement our policy *with great care* and with consideration as to how that should take place and where it should take place. Emphasis added.

On July 25, 1985, Deputy Assistant Attorney General (DAAG) Carolyn Kuhl testified and explained the new policy, at Tr. 10:

> Under its *new policy*, the Social Security Administration acknowledges that, to some extent at least, nationwide uniformity is no longer possible. The Secretary of Health and Human Services *will follow cir-*

> *cuit precedent in making final benefit determinations, except in those few cases presenting an issue which HHS, in consultation with the Solicitor General, determines should be relitigated in order to urge reconsideration of a rule of law in a circuit or to seek potential Supreme Court review*. Thus, as it applies to the courts, this policy means that we will follow circuit precedent when the Department of Justice enters the proceedings—that is in the district court- except where the Justice Department and HHS agree that the issue should be litigated further. . . . Emphasis added.

After the House Judiciary Subcommittee hearing, Members requested that the Commissioner provide a list of then pending "non-acquiescence" cases. SSA Chief Counsel Gonya provided the list of nonacquiescence cases and that list did *not* include *Jackson*. *See* July 25, 1985 House Record, at p. 31-33.

If the sworn July 25, 1985 Congressional testimony was accurate sworn Congressional testimony, then the nonacquiescence policy was to have ended on June 3, 1985. If the *Hecht* petition was granted, then this Court could consider whether the Second Circuit erred when it deferred to SSA Commissioner Barnhart's implementation of the *Jackson* nonacquiescence policy given the sworn July 25, 1985 Congressional testimony of Acting SSA Commissioner Mc Steen and then-DAAG Carolyn Kuhl.

D. The unheeded *Beckless* and *Ragsdale* admonitions

SSA Commissioner Barnhart's continued implementation of his *Jackson* nonacquiescence policy has been criticized by the Courts within the Seventh Circuit and in

non-Seventh Circuit States. If the petition is granted, then Solicitor General Olson can explain to this Court why the *Jackson* regulation was limited to the Seventh Circuit States given the July 25, 1986 sworn Congressional testimony that the nonacquiescence policy had ended on June 3, 1985 and that *Jackson* was not a nonacquiescence case.

On December 3, 1985, Judge Bua in the unappealed *Beckless I v. Heckler*, 622 F. Supp. 715 (D.C. Ill. 1985), certified an Illinois class of SSI recipients and applied, the *Jackson* to Illinois SSI recipients:

> However, it is not clear from the *Jackson* decision whether the Secretary is refusing completely to comply with the Seventh Circuit's decision. The Secretary has not issued a policy of non-acquiescence as was done in *Lopez*, and *without further evidence, it is unclear whether the Secretary has failed to perform her duties as a public official. Id.* at 719. Emphasis Added.

In the unappealed *Beckless II v. Chater*, 909 F.Supp. 575 (N.D.Ill. 1995), Judge Bucklo explained how the SSA Commissioner's interpretation of *Jackson* had eviscerated the Seventh Circuit holding:

> The defendant *essentially argues that the "Exception" applicable to the Seventh Circuit should be read out of section 416.1130(b)*. Opposition def. br. 10. By its words, the exception does not confine a business arrangement to payment of full rent charged by a landlord. *Rather, a business arrangement exists "when the amount of monthly rent required to be paid equals or exceeds the presumed maximum value. . . ." Id.* at n. 4, p. 580. Emphasis Added.

In the unappealed *Ragsdale v. Apfel*, 999 F. Supp. 814 (E. D. Vir. 1998), Judge Payne echoed Judge Bua's 1985 admonishment of Secretary Heckler in *Beckless I* and Judge Bucklo's 1995 admonishment of Secretary Shalala in *Beckless II*, and admonished SSA Commissioner Apfel for *not* to applying the *Jackson* standard to Virginia SSI recipients:

> This litigation need never have occurred. And, that it did, *reflects poorly on the Agency which elected not to seek review of the decisions issued by the Second or Seventh Circuits* and then put the Ragsdales to the needless task of establishing the obvious: that the decisions of the Second and Seventh Circuit were correct. Citizens residing in the Fourth Circuit should not be required needlessly to incur costs and fees in order to achieve the rights already enjoyed by those individuals residing in the Second and Seventh Circuit. It may be that the Agency's conduct is not sanctionable *in this case, but it must be hoped that the Agency will not, in the future, pursue the course which it has followed here. Id.* at 824. Emphasis Added.

Neither Judge Spatt nor the Second Circuit addressed the issue of the SSA Commissioner not heeding the *Beckless II* and *Ragsdale* admonitions. Rather, both Courts deferred to the decisions of the Social Security Commissioner and her Executive Branch counsel to ignore the holdings of these unappealed district court decisions.

E. The *Ford* nationwide class Notice conundrum

The SSA Commissioner's decision not to heed the admonitions of the *Beckless II* and *Ragsdale* Courts will now affect the SSA Commissioner's ability to comply

with Judge Sifton's *Ford* nationwide class due process decision. The SSA Commissioner is now in the process of constructing "Ford" Notices that will cure the due process violation caused by the termination and reduction Notices not containing citations to the applicable regulations. The SSA Commissioner must now decide whether to include a citation to the "Jackson" income regulation in the *Ford* Notices sent to SSI recipients who are receiving private rent subsidies in the 47 States that are not within the Seventh Circuit.

On September 29, 1999, in *Ford v. Apfel* Judge Sifton addressed the issue of the SSI Notices that did not explain the standards that were applied by SSA Commissioner Apfel in denying benefits. Citing *Gray Panthers v. Schweiker*, 652 F. 2d 146, 168-169 (D.C.Cir. 1980), Judge Sifton highlighted the Kafkaesque situation of nationwide class of SSI recipients for whom the standards used to compute benefits are not explained to the SSI applicants and recipients:

> Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose—*and resembles more a scene from Kafka than a constitutional process*. Without notice of the specific reasons . . . . a claimant is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument—at the risk of missing the critical one altogether. *Ford*, p. 181. Emphasis Added.

In *Hecht*, the SSI Notices did not cite to the applicable regulations. Indeed, the Notices did not even cite to the POMS that was relied upon in reducing the monthly benefits.

In summary, if SSA Commissioner Apfel acquiesces to *Christensen* and acknowledges that the Judiciary is to defer to duly promulgated regulation, but not defer to the agency manual interpretations, then the "Jackson" regulation should be cited in the "Ford Notices and applied equally in all 50 States. In rendering its decision, the Second Circuit did not apply the "Jackson" regulation to the *Hecht* facts, but rather, relied upon an agency manual which interprets the SSA Commissioner's promulgated regulation.

POINT II

BECAUSE SSA COMMISSIONER BARNHART AND ATTORNEY GENERAL ASHCROFT ARE IMPLEMENTING A *JACKSON* NONACQUIESCENCE POLICY, THE SSA COMMISSIONER AND THE ATTORNEY GENERAL HAVE BREACHED THEIR ARTICLE II SECTION 3 DUTY TO "TAKE CARE THE LAWS BE FAITHFULLY EXECUTED."

The SSA Commissioner's *Jackson v. Schweiker*, 683 F. 2d 1076 (7th Cir. 1982) nonacquiescence policy, ratified by Attorney General Ashcroft, is presented in *Hecht* because the "Jackson" regulation, 20 C.F.R. § 416.1130 (b), was not applied to the *Hecht* facts. This raises the Constitutional issue of whether the SSA Commissioner Barnhart and AG Ashcroft have breached their Article II, Section 3 duty to "take Care the laws be faithfully executed," by continuing to implement the SSA nonacquiescence policy contrary to the sworn July 25, 1985 Congressional testimony that the nonacquiescence policy was to have ended on June 3, 1985. This then raises the issue of whether the SSA nonacquiescence policy, based

on *United States v. Mendoza*, 464 U.S. 154 (1984), should have ended on June 3, 1985.

A. The Article II, Section 3 Constitutional duty and *Marbury v. Madison*

Based on their appointment by the President, SSA Commissioner Barnhart and Attorney General Ashcroft have an Executive Branch official's Constitutional duty to fulfill the Article II, Section 3 duty that they "shall take Care that the Laws be faithfully executed." This "take Care" clause is not being implemented when the Laws are not being executed equally to all aged, blind, and disabled citizens residing in all 50 States.

Pursuant to Article III of the constitution, the Supreme Court has the Constitutional authority to review Executive Branch decisions to determine if Executive Branch officials are breaching any of the Executive Branch's Constitutional duties. Attorney General Ashcroft's legal advice that SSA Commissioner Barnhart does not have to acquiesce to unappealed *Jackson* decision, now presents this Court with a Separation of Powers issue.

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed 60 (1803), the Supreme Court fulfilled its Article III Constitutional duty to judicially review the decision of an Executive Branch not to enforce a law. The Supreme Court laid down a Constitutional marker that has endured for two centuries that an individual has a right to judicial review of an Executive Branch decision applying a statute:

> But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual

> who considers himself injured, *has a right to resort to the laws of his country for a remedy*. Emphasis Added.

The *Marbury* Court made clear that the Constitution provides that the Supreme Court has a right of judicial review over any case arising under the laws of the country:

> The constitution vests the whole judicial power of the United States *in one supreme court*, and such inferior courts as Congress shall, from time to time, ordain and establish. *This power is extended to all cases arising under the laws of the United States*; and consequently, in some form, may be exercised over the present case; because the right claims is given by a law of the United States. Emphasis Added.

Like any citizen, an Executive Branch official always has a right to appeal judicial decisions of district and circuit courts interpreting statutes if the Solicitor General of the United States believes that the district or circuit court incorrectly interpreted a law or an Executive Branch interpretation of the law. However, once the Supreme Court has rendered its decision, there can be no further Executive Branch appeal.

Thus, if the President's SSA Commissioner and the Attorney General fulfill their Article II, Section 3 duty to "take Care that the Laws be faithfully executed," then SSA Commissioner Barnhart and Attorney General Ashcroft should acquiesce to the unappealed *Jackson* decision. If SSA Commissioner Barnhart believes that *Jackson* was "incorrectly" decided, then the remedy is to amend the regulation and not breach the Executive Branch duty to "take Care" that the laws be faithfully executed.

B. The *Mendosa* nonacquiescence policy standard.

In *Mendosa*, the Court established the standards by which the Executive Branch can implement a nonacquiescence policy in an Immigration and Naturalization case. *Hecht* raises the issue of whether the *Mendosa* nonacquiescence holding applies to the Social Security Administration and to a *Ford v Shalala* nationwide class member.

The Department of Health and Human Services (HHS) and Social Security Administration nonacquiescence policy has a two decade long jurisprudence history. *See The Constitutional Case Against Intracircuit Nonacquiescence, Coenan, 75 Minn. L. Rev. 1399 (1991). Request for Public Comments: Agency Nonacquiescence in Decisions of the Court of Appeals*, 53 FR 71 (April 14, 1988). *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989). *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 Yale L.J. 801 (1989). *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. Pitt. L. Rev. 399 (1989).

The Second Circuit has had an over decade long experience reviewing the implementation of the Social Security Act "nonacquiescence" policy of HHS Secretaries Heckler, Bowen, Sullivan, and Shalala in the *Stieberger* litigation saga. *See Steiberger I v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985) *vac*, 801 F. 2d 29 (2d Cir. 1986), *Stieberger II v. Sullivan*, 738 F. Supp. 716 (N.D.N.Y. 1990), *Stieberger III v. Sullivan*, 792 F. Supp. 1376 (S.D.N.Y. 1992), 801 F. Supp. 1079 (S.D. N.Y. 1992),

Stieberger IV v. Apfel, 134 F. 3d 37 (2d Cir. 1997), *rev'g Stieberger v. Chater*, No. 95 cv 5622), *Stieberger V v. Apfel*, 1998 WL 556156 (S.D.N.Y. 1998). *See also The Politics of Nonacquiescence" The Legacy of Stieberger v. Sullivan*, 46 West SRRS 821 (1995).

The issue of the application of the *Mendosa* standard after the July 25, 1985 sworn Congressional testimony of Acting SSA Commissioner Mc Steen and DAAG Kuhl indicating that the HHS nonacquiescence policy had ended on June 3, 1985, was presented to this Court in *Gordon v. Shalala*, 55 F. 3d 101 (2d Cir., cert. den. 517 U.S. 1103, 116 S. Ct. 1317, 134 L. Ed. 470 (1996). In the government's February, 1996 *Gordon* Brief in opposition to the petition for a writ of certiorari, Solicitor General Days made the *Mendosa* nonacquiescence argument notwithstanding Solicitor General Days' knowledge of the sworn July 25, 1985 Congressional testimony that the nonacquiescence policy was to have ended on June 3, 1985.

Hecht provides an opportunity for the Court to review the process of how the Solicitor General applied the *Mendosa* standard to the SSI program. SSI recipients have limited access to legal resources to appeal the agency's nonacquiescence decisions which would allow for the percolation of decisions to this Court. *See* the SSI nonacquiescence regulation. 20 C.F.R. § 416.1485 *Application of Circuit Court Law*.

C. The June 14, 1991 Associate Commissioner Private Rental Subsidies Memo

The petitioner argues that the Second Circuit erred when it determined that the payment by the Trustee of the rent of the Daniel Hecht was not a rent subsidy. In the

Second Circuit Record was a June 14, 1991 memo that had been secured in a FOIA action that clearly indicated that HHS Secretary Sullivan had determined that private payments of rent for SSI recipients were rent subsidies. *See* Appendix Exhibit B.

The memo of the Deputy Commissioner for Programs identified the private rental subsidy issue that was caused by the "Jackson" income regulation, 20 C.F.R. § 416.1130(b), only being applied within the three Seventh Circuit States:

> In 1989, *Ruppert* challenged *rental subsidy policy* (and related issues) in the Second Circuit. That court remanded three of the eleven cases for determinations of *whether the rental subsidies charged reflected any actual economic benefit*. Although the court did not require application of the *Jackson* regulation, it did suggest that the regulation might provide a good indication of economic benefit. *Id.* at p. 2. Emphasis Added.

The Deputy Commissioner flagged in 1991 the same 2003 *Bush v. Gore* equal protection conundrum of SSA Commissioner Barnhart, that different standards were being applied in the Seventh and Second Circuit States in a program that the Congress intended was to apply equal standards in all 50 States:

> Under this option, the *Jackson* rule would continue to apply in the Seventh and Second Circuits. *In these circuits*, therefore, whether the required rent equals or exceeds the presumed maximum value, in-kind support and maintenance will not be found as a result of that arrangement. If the requires rent is less than the presumed maximum values, the amount of

> the rental subsidy would be the difference between the required rent and the presumed maximum value or current market value, whichever is less. *In all other circuits*, however, we would continue to consider the difference between the current market rental value and the amount of rent charged as a rental subsidy. The amount of in-kind support and maintenance charged the individual would be subject to the presumed maximum value." *Id.* at 7-8. Emphasis Added.

The Second Circuit chose to ignore the Associate Commissioner's June 14, 1991 Rental Subsidies Decision and the fact that the State Court Judge included this Court's *Ruppert* holding in the State Court ordered Trust:

> The distinction POMS SI 01120.200 draws between trust principal and disbursements *is persuasive both because it is consistent with the treatment of in-kind income in 20 C.F.R. 416.1103 (g) as well as with New York State trust law. See* N.Y. Est. Power & Trusts Law 7-1.12(b)(3) (Mc Kinney 2002) (actual distributions from the trust may be considered to be income or resources of the beneficiary to the extent provided by the terms of any (government benefits) program"). Emphasis Added.

The petitioner argues that if the "power to persuade" standard is to be applied, then it is first to be applied by SSA Commissioner Barnhart *after* reading the *unredacted* June 14, 1991 Rental Subsidy memo with its *Jackson* options. The Court deferred to the Executive Branch Counsel's opinion that the payment by the Trustee of the rent was not a private rent subsidy. The Record does not

indicate that the SSA Commissioner had considered the options presented in the June 14, 1991 Rental Subsidies memo that directly addressed the *Jackson* nonacquiescence policy conundrum when there were private rent subsides in the States that were not within the Seventh Circuit.

The Second Circuit determined that the *Jackson* and *Ruppert* holdings and the application of 20 C.F.R. 416.1130 (b), did not apply based on its conclusion that this case did not involve a rent subsidy notwithstanding the panel's acknowledgement that Daniel did not pay for his own rent:

> In this case, however, as the district court correctly observed, *Hecht does not pay any rent. Rather, it is the Trustee who, pursuant to court order, pays Hecht's parents for his room and board.* When a third party pays a recipient's expenses, the applicable regulation is 20 C.F.R. 416.1103(g) (1994), which provides for "the value of anything the recipient receives as a result of such payment (to be) included in the recipient's income. "Ellis v. Apfel 147 F. 3d at 141. Thus, a third party's payment of some amount of room and board provides Hecht with in-kind income pursuant to 416.1103(g)." *Id.* Emphasis Added.

The petitioner argues that the June 14, 1991 memo is a "smoking gun" memo that the Second Circuit erred when it held that the payment of the rent by the Trustee of the SNT was not a private rent subsidy. The petitioner argues that if the Attorney General and the SSA Commissioner acquiesce to *Christensen*, then SSA Commissioner Barn-

hart should be reading the June 14, 1991 memo when considering the content of the "Ford" Noticies sent to *Ford* class members who receive private rent subsidies.

D. The tandem application of *Bush v. Gore* equal protection standard with the *Christensen* administrative law standard reveals the fatal flaw in applying the *Mendosa* nonacquiescence policy to SSI program in which Congress intended that there be an *equal* application of the duly promulgated regulations in all 50 States.

Since Congress intended that SSI regulations be *equally* applied in all 50 States, the appellant argues that the tandem application of the *Bush v. Gore*, 121 S. Ct. 525 (2000), equal protection standard with the *Christensen* administrative law standard, will eliminate any vestige of the implementation of the pre-June 3, 1985 nonacquiescence policy that has survived into 2003. The plaintiff argues that the "law" to be cited in the *Ford* Notices sent to millions of legally *defenseless* SSI recipients residing in all 50 states, both within and without the circuits, must be the *same* duly promulgated regulations.

In *Bush v. Gore*, the Supreme Court held that the government must apply the same legal standard when making the *same* adjudication:

> The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary. *Bush v. Gore*, 121 S. Ct. 525 (2000).

The petitioner makes the *Bush v. Gore* equal protection argument that if the same "chad" voting rule must be equally applied in Palm Beach County as applied in Dade County, then the *same Jackson* regulatory standard applied in the Seventh Circuit States, must be applied *equally* in all 50 States. As long as SSA Commissioner Barnhart does not apply the *same* duly promulgated regulatory standards equally in all 50 States, then this is an ongoing per se violation of the *Bush v. Gore* equal protection standard as applied to the SSI recipients in the 47 States whose benefits were reduced because the SSI recipients received private rental subsidies that paid their rent which was more than one-third of their monthly SSI income.

If the Court granted the petition, then Attorney General Ashcroft and Solicitor General Olson would have to address not only the *Bush v. Gore* equal protection standard issue, but also the *Christensen* administrative law holding as to Judicial deference to duly promulgated regulations, and not deference to Executive Branch counsel's interpretations of the regulations. The fact that the *Jackson* regulation is not applied in all 50 States reveals the fatal flaw in the argument that the *Mendosa* nonacquiescence standard should be applied to HHS and SSA cases.

In summary, the petitioner respectfully submits that the Court grant the petition in order that the Court can address the issue of whether the *Mendosa* nonacquiescence policy holding applies to the SSA. This is a timely issue because SSA Commissioner Barnhart and Attorney General Ashcroft have an Article II, Section 3 duty "to take care that the Laws be faithfully executed" when they

construct the "Ford" Notices sent to SSI recipients like petitioner Hecht who receives private rent subsidies.

CONCLUSION

Therefore, it is respectfully submitted that the petition be granted.

Respectfully submitted,

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